

FROM A QUANTITATIVE TO A QUALITATIVE MIGRATION AND REFUGEE SYSTEM

Heribert Franz Koeck, Dr. iur. (Vienna), M.C.L. (Ann Arbor), Dr. h. c. mult.
Emeritus Full Professor of Law, Special Representative of the Johannes Kepler University Linz
for Eastern and South-Eastern Europe, Austria

RESUMEN:

Toda persona que es refugiada debido al temor fundado de ser perseguida tiene derecho a la protección. Sobre este principio, se basan tanto los regímenes universales de Ginebra como los europeos. Sin embargo, ambos regímenes tienen serias deficiencias. Se basan en el supuesto implícito de que cada Estado puede recibir y otorgar asilo a cualquier refugiado. Este supuesto no está bien fundado. No se puede esperar razonablemente que ningún Estado, y por lo tanto ningún Estado miembro de la Unión Europea, tome más refugiados de los que puede integrar y tome refugiados que no merecen el estatus de refugiado. Los “verdaderos” refugiados deben estar separados de los llamados refugiados económicos u otras categorías de migrantes que no califican para el estatus de refugiado. En segundo lugar, los “verdaderos” refugiados que están dispuestos a aceptar los valores europeos deben separarse de los que no lo hacen. Pero también existe la obligación de la comunidad internacional en su conjunto de poner fin a las situaciones que hacen que las personas huyan.

ABSTRACT:

Everyone who is a refugee due to a well-founded fear of being persecuted has a right to protection. On this principle, both the universal Geneva and the European Dublin regimes are based. However, both regimes have serious deficiencies. They are based on the implicit assumption that every state is able to receive, and to grant asylum to, any refugee. This assumption is not well-founded. No state, and thus no Member State of the European Union, can reasonably be expected to take more refugees than it can integrate and to take refugees who do not deserve refugee status. “True” refugees must be separated from so-called economic refugees or other categories of migrants not qualifying for the refugee status. Second, “true” refugees who are ready to accept European values have to be separated from those who do not. But there is also an obligation of the international community as a whole to put an end to situations which cause people to flee.

PALABRAS CLAVE: *Refugiado, Migración, Unión Europea.*

KEYWORDS: *Refugee, migration, European Union.*

If we talk about refugees, the starting point has to be the Convention relating to the Status of Refugees, also known as the 1951 Refugee Convention, which was approved at a special United Nations conference held in Geneva 1951.¹

The Convention to which presently about 150 states are parties defines who is a refugee, and sets out the rights of individuals who apply for asylum and the responsibilities of nations that grant asylum. The Convention

¹ United Nations General Assembly Resolution 429 (V) of 14 December 1950,

<http://www.unhcr.org/ref-world/docid/3b00f08a27.htm>

also sets out which people do *not* qualify as refugees, such as war criminals.

The Convention implements Article 14 of the 1948 Universal Declaration of Human Rights, which recognizes the right of persons to seek asylum from persecution in other countries. A state may grant refugees rights and benefits in a state in addition to those provided for in the Convention.

The Convention was initially limited to protecting European refugees from before 1 January 1951, the aftermath of World War II, though states could make a declaration that the provisions would apply to refugees from other places.

The Convention was supplemented by the 1967 Protocol,² which removed the time limits and applied to refugees «without any geographic limitation» but left unaffected declarations previously made by parties to the Convention on geographic scope.

Article 1 of the Convention, as amended by the 1967 Protocol, defines a refugee as « [a] person who owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it. »

A refugee's right to be protected against forcible return, or refoulement, is set out in Article 33(1) of the Convention which states: «No Contracting State shall expel or return (refouler) a refugee in any manner whatsoever to the frontiers of territories where his life or freedom would be

threatened on account of his race, religion, nationality, membership of a particular social or political opinion. » It is widely accepted that the prohibition of forcible return is part of customary international law. This means that even States that are not party to the 1951 Refugee Convention must respect the principle of non-refoulement.

Asylum is granted to people fleeing persecution or serious harm in their own country and therefore in need of international protection. Asylum is a fundamental right; granting it is an international obligation under the Convention.

1.- REFUGEES AND THE EUROPEAN UNION

Since 1999, the EU has been working to create a Common European Asylum System (CEAS) and improve the current legislative framework.³

The EU, which constitutes an area of open borders and freedom of movement and where countries share the same fundamental values, and its Member States need to have a joint approach to guarantee high standards of protection for refugees. Procedures must at the same time be fair and effective throughout the EU and impervious to abuse. With this in mind, the EU States have committed to establishing a Common European Asylum System.⁴

Asylum must not be a lottery. EU Member States have a shared responsibility to welcome asylum seekers in a dignified manner, ensuring they are treated fairly and that their case is examined to uniform standards so that, no matter where an applicant applies, the outcome will be similar.

² The Protocol of 1967 is attached to United Nations General Assembly Resolution 2198 (XXI) of 16 December 1967, <http://www.unhcr.org/refworld/docid/3b00f1cc50.htm>

³ See http://ec.europa.eu/dgs/home-affairs/what-we-do/policies/asylum/index_en.htm

⁴ See Summary of The Common European Asylum System - with draft procedures directive, Migration Watch UK, <http://www.migrationwatchuk.org/briefing-paper/37>

Asylum flows are not constant, nor are they evenly distributed across the EU. They have, for example, varied from a peak of 425 000 applications for EU-27 States in 2001 down to under 200 000 in 2006. In 2012, there were 335,895, and rocketed in 2014 and 2015.

Under the Dublin Regulation,⁵ an asylum seeker has to apply for asylum in the first EU

⁵ The Dublin regime was originally established by the Dublin Convention, which was signed in 1990, and came into force 1997/1998. Norway and Iceland, concluded agreements with the EC to apply the provisions of the Convention in their territories. The Dublin II Regulation was adopted in 2003, replacing the Dublin Convention in all EU member states. The Dublin III Regulation (No. 604/2013) was approved in June 2013, replacing the Dublin II Regulation, and applies to all member states except Denmark. It came into force on 19 July 2013. It is based on the same principle as the previous two, i.e., that the first Member State where finger prints are stored or an asylum claim is lodged is responsible for a person's asylum claim. One of the principal aims of the Dublin Regulation is to prevent an applicant from submitting applications in multiple Member States. Another aim is to reduce the number of «orbiting» asylum seekers, who are shuttled from member state to member state. The country that the asylum seeker first applies for asylum is responsible for either accepting or rejecting asylum, and the seeker may not restart the process in another jurisdiction. Together with the EURODAC Regulation, which establishes a Europe-wide fingerprinting database for unauthorised entrants to the EU, the Dublin Regulation aims to «determine rapidly the Member State responsible [for an asylum claim] » and provides for the transfer of an asylum seeker to that Member State. Usually, the responsible Member State will be the state through which the asylum seeker first entered the EU. However, since Greece started to wave refugee through without taking their fingerprints, it has become more difficult to establish the country of entry into the EU, especially if refugees, on their way to Austria, Germany or Sweden, have to cross the territory of states not Members of the EU, like Macedonia and Serbia.

country they entered, and, if they cross borders to another country after being fingerprinted, they can be returned to the former.

2.- THE REFUGEE CRISIS FOLLOWING THE WAR IN SYRIA

Yet, the Dublin regime was not set up with a view to a refugee wave as exorbitant as that caused by the civil war in Syria and, in its wake, by those from other world regions Afghanistan, Pakistan, Iraq, the Maghreb and Black Africa. In 2014, the number of asylum applicants in the EU jumped to more than 625.000, twenty per cent of whom were Syrians. Mainly due to the continuing civil war in Syria, more than a million migrants and refugees crossed into Europe in 2015, sparking a crisis as countries struggle to cope with the influx, and creating division in the EU over how best to deal with resettling people. The vast majority arrived by sea but about 34,000 made their way over land via Turkey. Member States of entry mainly were Greece, Italy, Spain, Malta, Cyprus and Bulgaria, but Member States most affected were Germany, Austria and Sweden.

During the 2015 European refugee and migrant crisis, Greece considered herself overstrained by the great number of refugees arriving from Turkey by land and by sea and put them on the track to other Member States without fulfilling its obligations under the Dublin Regulation. Hungary became overburdened by asylum applications to the point that it stopped on 23 June 2015 receiving back its applicants who later crossed the borders to other EU countries and were detained there.

In order to avoid a humanitarian disaster, Germany decided, on 24 August 2015, to suspend the Dublin Regulation as regards Syrian refugees and to process their asylum applications directly itself. On 2 September 2015, the Czech Republic also decided to

defy the Dublin Regulation and to offer Syrian refugees who have already applied for asylum in other EU countries and who reach the country to either have their application processed in the Czech Republic (i.e. get asylum there) or to continue their journey elsewhere.

On the other hand, Member States such as Hungary, Slovakia and Poland officially stated their denial to any possible revision or enlargement of the Dublin Regulation, specifically referring to the eventual introduction of new mandatory or permanent quotas for solidarity measures.

Germany soon found it necessary to institute a kind of border control, and Austria, Slovenia, and Croatia followed suit. When it turned out that Germany, the preferred country of asylum seekers, would not be able to swiftly take all of them and that, therefore, the number of refugees remaining in Austria and seeking asylum there also rose dramatically, the Austrian government decided to limit the number of refugees who would be granted asylum to 37.500 in 2016 (which is half of the number of 2015) and then to reduce it continuously, restricting it for the years 2016 to 2019 to a maximum of 127.500.

The political turn around so dearly needed does not mean that the borders of Europe have to be closed to migrants in general and to refugees in particular. Moral duties as much as human rights embodied both in national, supranational and international law – especially the Geneva Convention relating to the Status of Refugees of 1951, together with the Protocol of 1967, Directive 2011/95/EU of the European Parliament and the Council of 13 December 2011 on standards for the qualification of third-country nationals or stateless persons as beneficiaries of international protection, for a uniform status for refugees or for persons eligible for subsidiary protection, and for the content of the protection granted⁶ and the Dublin Regime of the EU, based on

Regulation No. 604/2013⁷ – do not allow for such a measure. At the same time, however, it is clear that no state and no region, Europe not excluded, can do the impossible or what cannot reasonably be expected from it. Even in this case, the fundamental legal principles of *bona fide* and *ad impossibilia nemo tenetur* may be invoked and have to be respected.

3.- DEFICIENCIES OF THE GENEVA AND DUBLIN REGIMES

However, both the Geneva and the Dublin regime – though originally well meant – have serious deficiencies.

First, the Geneva regime is based on the implicit assumption that every state is able to receive, and to grant asylum to, any refugee. The Dublin regime is based on the implicit assumption that every Member State of the European Union is able to grant asylum to any refugee.

This implicit assumption shows that neither the parties to the Geneva Convention nor the European Council have considered a situation where a State could be overburdened with the number of refugees seeking asylum there. Possibly, the idea that refugees could become a burden was then considered politically incorrect and thus was not further dealt with.

Second, both the Geneva and the Dublin regime are based on the implicit assumption that every refugee is deserving asylum. They do not distinguish between persons worthy of asylum and those who are not worthy of it.

⁷ Regulation (EU) No 604/2013 of the European Parliament and of the Council of 26 June 2013 establishing the criteria and mechanisms for determining the Member State responsible for examining an application for international protection lodged in one of the Member States by a third-country national or a stateless person (recast), Official Journal of the European Union L 180/31.

⁶ Official Journal of the European Union L 337/9

The Geneva regime makes the refugee status and the consequent right to asylum dependent only on a person's «well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion». The Geneva regime does not make the right to asylum dependent on whether this person can be expected not itself to engage in acts amounting to persecution for reasons of race, religion, membership of a particular social group or political opinion. It is therefore also based on the implicit presumption that everyone who once has been threatened with, or has actually suffered from, persecution would refrain threatening others with, or subjecting them to such persecution.

The Dublin regime does not distinguish between border states of the European Union and Member States that are not border states. It is based on the implicit presumption that the different forms of transportation by which refugees could enter the European Union – by land, by sea and by air – would result in an equitable, or at least acceptable, distribution of refugees among the Member States.

The implicit assumptions that are at the basis of the Geneva and the Dublin regime are not well-founded. No state, and thus no Member State of the European Union, can reasonably be expected to take more refugees than it can integrate and to take refugees who do not deserve refugee status. Every state, and thus every Member State of the European Union is entitled to invoke the legal principle of *ad impossibilia nemo tenetur* and the legal principle of *bona fides*, according to which there is no obligation to do the impossible or to accept the unbearable. Since these are overriding principles they cannot be ruled out by either treaty or customary international law.

4.- RECOGNITION OF EUROPEAN VALUES A CONDITION FOR ADMISSION

In fact, these principles are recognised by the European Union and its Member States themselves in connection with admission to membership in the Union. Though Article 49 TEU states that «[a]ny European State which respects the values referred to in Article 2 and is committed to promoting them may apply to become a member of the Union», the Copenhagen criteria established by the Copenhagen European Council in 1993 and strengthened by the Madrid European Council in 1995 make admission dependent upon the fulfilment of the following criteria: stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities; a functioning market economy and the ability to cope with competitive pressure and market forces within the EU, and the ability to take on the obligations of membership, including the capacity to effectively implement the rules, standards and policies that make up the body of EU law (the 'acquis'), and adherence to the aims of political, economic and monetary union.

If it is neither immoral nor illegal to make admission of a state to the European Union dependent upon its respect for the values stated in Article 2 TEU, why should it be immoral or illegal to make admission of a person to the European Union dependent upon its respect for the same values? And if it possible to carefully examine whether states aspiring to membership do indeed fulfil the just-mentioned requirements, why should it be impossible to equally carefully examine whether persons seeking admittance to the European Union – whether as «true» refugees or otherwise – do respect the values stated in Article 2 TEU?

Is there a practical need for examining the stance a person takes towards the values stated in Article 2 TEU? At present, there are at least two reasons why such an examination is needed.

5.- DESERVING' VERSUS 'NON-DESERVING' REFUGEES

First, the recent wave of refugees is threatening to over-strain the reception capacity of the Member States of the European Union or at least of some of them. These states have answered, first, with the re-introduction of border controls under exemption clauses of the Schengen regime; second, with the adoption of annual upper-limits for the number of refugees to be accepted.

According to what has been said before, upper-limits cannot be regarded illegal *per se* if they are the only way to keep the number of refugees within the limits of what is possible or reasonable. This applies even if, in this context, all Member States of the European Union would honour the principle of solidarity and take their fair share of refugees; because the European Union as a whole cannot be expected to admit more refugees than is possible and reasonable. The right of the European Union and its Member States to put a ceiling on the number of refugees in order to stay within the possible and reasonable is out of the question. (This does not, of course, prevent a discussion about the number of refugees Europe is able to manage, and therefore about where to install the ceiling.)

If the European Union and/or its Member States cannot take in all those who claim to be refugees, it is only right and just to distinguish between deserving and non-deserving refugees, i.e. those who adhere to the European values and those who do not, and to reserve the annual quota to the former.

But there is a second, even more compelling argument, namely the radicalisation of the Muslim world. Originally, refugees and other migrants coming to Europe were believed to be happy to adopt themselves to the Western way of life. This might have very well been so thirty years ago, and might still continue to do so,

had the Islamic world not begun to radicalise.⁸

Bin Laden, the head of Al-Qaida, was inspired by the Palestinian Sunni scholar Abdullah Azzam who preached a relentless jihad until either all jihadist fighters were dead or the Muslim world empire would have emerged. His theories were first applied by Arab volunteers who fought against the Soviet invasion in Afghanistan; but afterwards served as the basis of terrorist attacks all over the world. In his paper *Join the Caravan*,⁹ Azzam called upon all Muslims to rally in defence of Muslim victims of aggression and to restore Muslim lands from foreign domination. Azzam emphasized the violence of religion, preaching that, «those who believe that Islam can flourish [and] be victorious without Jihad, fighting, and blood are deluded and have no understanding of the nature of this religion.» He was opposed to any kind of compromise, stating «Jihad and the rifle alone: no negotiations, no conferences and no dialogues.» The Islamic State in Syria and the Iraq is rooted in this tradition, as are the terrorists presently threatening the capitals of Europe and the cities of the United States. As early as 1994, a video showed Azzam exhorting his audience to wage *jihad* in America (which Azzam explains «means fighting only, fighting with the sword»); and his cousin, Fayiz Azzam, says «Blood must flow. There must be widows; there must be orphans.»

Successful terrorist attacks like those on the World Trade Centre in 2001 provided Muslims all over the world with a new self-awareness and self-assurance. Even those who were not prepared to join the Jihad often were ready to revive their Muslim religious and cultural customs and

⁸ For the following, see, inter alia: ATWAN, Abdel Bari: *The Secret History of al Qaeda*, Berkeley, CA: University of California Press, 2006; *id.*, *After Bin Laden: Al-Qaeda, The Next Generation*, London/New York: Saqi Books (London)/ New Press (New York), 2012.

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https://archive.org/stream/JoinTheCaravan/JoinTheCaravan_djvu.txt

consequently to reject the Western way of life together with the values which form its basis. It was then that Turkish women in Western Europe started to wear the headscarf, at a time when to do so was still forbidden in Turkey herself, and that forced marriages and honour killings became fashionable in Muslim social strata. And the latter has become the breeding ground for people who are ready to attack non-Muslim people and institutions, be it in the form of terrorism as in Paris, be it in the form of large-scale harassment as in Cologne and other German cities.¹⁰

Our societies, our states and our European Union cannot afford people who pose a threat to our values and way of life. We must prevent them from further infiltrating Europe, even if they come under the guise of refugees. The present situation gives us the chance to do so.

First, «true» refugees must be separated from so-called economic refugees or other categories of migrants not qualifying for the refugee status. Second, «true» refugees who are ready to accept European values have to be separated from those who do not. It is very likely that the number of «true» refugees worthy of European asylum will be much smaller than the number of those who have so far entered Europe in an uncontrolled process, and that Europe will be able to satisfactorily cope with the refugee problem if all European countries cooperate in this matter on the basis of the principle of solidarity.

6.- ADDITIONAL MEASURES REQUIRED

In order to cope with the refugee problem in a satisfactory manner, additional administrative and substantive measures will have to be taken. The European Union needs an efficient border regime that permits to

deal with applications for asylum in reception centres in those Member States which are the first to be confronted with new refugees; and it needs an efficient border control system that prevents illegal entry into the European Union by those who are not eligible under the refugee regime.

In the end, however, dealing with refugees in an orderly manner is not sufficient. The European Union and its Member States partake in the obligation of the international community as a whole to protect civilians in any country and region where their security and human rights are seriously threatened. With regard to refugees, this means that an end must be put to situations which cause people to flee. The fact that the Security Council, because of the political disagreement among its permanent members, so far has failed to put an end to the civil war in Syria demonstrates that much diplomatic effort will still have to be made because this is a task that cannot be accomplished by Europe alone.

¹⁰ See, inter alia: FALK, Avner: *Islamic Terror: Conscious and Unconscious Motives*, Westport, Connecticut, Praeger Security International, 2008.

